SUPREME COURT OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

PLAINTIFFS/APPELLANTS JIE CAO AND HAINING "FRAZER" XIA'S SUPPLEMENTAL BRIEF

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* For the Court's convenience, the accompanying statutory addendum includes the versions of A.R.S. § 33-1228 effective in 2018 (in effect when the forced sale occurred) and 1986 (in effect when the Xias purchased Unit 106).

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I. A.R.S. § 33-1228 violates article 2, § 17 because it authorizes the taking of private property for private use.

This case rests on a simple premise. The legislature cannot enact a law that allows one person to take another's home by appraising the home, presenting a check for that amount to the owner, and recording title to that person's property.

The Arizona Constitution prohibits taking private property for private use, except for inapplicable enumerated exceptions: "Private property shall not be taken for private use …." Ariz. Const. art. 2, § 17.

No one questions that this case involves "private property." Each condominium unit, including the Xias' Unit 106, is an individually owned "separate parcel of real estate." A.R.S. § 33-1204(A). No one questions that what occurred here resulted in "private use." Unit 106 ended up in the hands of a private company, and was not used to build a road or a school, or put to any other public use.

Nor does anyone question that the government cannot delegate to private actors the power to take private property for private use. Otherwise, Mesa could have avoided article 2, § 17 in *Bailey v. Myers*, 206 Ariz. 224 (App. 2003), by authorizing the developers to acquire land directly for the government-favored redevelopment project. The legislature lacks the constitutional power to enact a law that gives a private entity the power to take private property.

This point should not be controversial. As the Xias explained (Petition at 11; Cross-PFR Resp. at 7-11; COA Op. Br. at 45-52), this has been the law for a century.

Arizona's first takings case, *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 262 (1914), involved not direct eminent domain, but a law that authorized one party to take the private property of another. This Court held that under article 2, § 17, the legislature cannot "*authorize* the taking of private property …." *Id.* (emphasis added).

Even though article 2, § 17 protects property rights more than the federal takings clause, the U.S. Supreme Court agrees with this fundamental principle. *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), reached the same result as *Inspiration*: a law violates the takings clause when it authorizes a private party to interfere with someone else's private property. Most recently, the U.S. Supreme Court again confirmed that "government-authorized invasions of property" violate the takings clause, even when a private actor exercises the authority. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2074 (2021).

Such an intrusion does not require a court to balance any interests. A government-authorized intrusion "constitutes a *per se* physical taking." *Id.* at 2080. Full compensation does not remedy the constitutional violation, either. Article 2, § 17 requires "just compensation" for *public* uses, but it categorically *prohibits* all non-enumerated takings for private use. Full payment doesn't fix it.

In determining whether a law effects a taking, courts must look to "longstanding background restrictions on property rights." *Cedar Point*, 141 S.Ct. at

2079. The U.S. Supreme Court recently confirmed that although state law is one source for understanding property rights, "state law cannot be the only source. Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 638 (2023) (quotation marks omitted).

Here, the fact that condominium purchasers might know about A.R.S. § 33-1228 before purchasing does not mean that the eradication of the property right is anything less than a taking. In *Tyler*, for example, the condo owner could have known about Minn. Stat. § 282.08, which authorized the state to sell someone's property to satisfy delinquent taxes, and allowed the state to keep the surplus after satisfying the back taxes. Yet that statute still violates the takings clause. 598 U.S. at 647. The takings clause is about takings, not notice.

Nor is condominium ownership barred by "background restrictions" in such a way as to entitle the state to obliterate such rights by fiat. This analysis begins by "look[ing] to traditional property law principles, plus historical practice and [judicial] precedents." *Id. at* 638 (quotation marks omitted). The rights at issue here fall squarely within the traditional property law principles that existed long before Arizona enacted A.R.S. § 33-1228 in 1985.

For hundreds of years property has meant "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total

exclusion of the right of any other individual in the universe." 2 Wm. Blackstone, *Commentaries* *2. Property entails a "bundle of real property rights." *Eardley v. Greenberg*, 164 Ariz. 261, 265 (1990). "One of the principal elements of property is the right of alienation or disposition." *Buehman v. Bechtel*, 57 Ariz. 363, 375 (1941) (citation omitted).

Forced sales under A.R.S. § 33-1228(C) deprive condominium owners of *all* property rights. On April 8th, 2019, the Xias had the right to exclude others, the right to use and enjoy the unit, and the right to alienate or dispose of the unit. The next day, they had none of those rights. Their property rights went from full to zero.

In addition, condominium-style ownership is not new. It existed at least as early as a millennium ago:

> *From the 1100s* onward we already find extremely wide-spread in German towns so-called "story" or "roomage" ownership—ownership of the individual stories of a building. Houses were horizontally divided, and the specific parts so created—the stories, floors, and cellars—were *held by different persons in separate ownership*; this being associated, as a rule, with *community ownership* of the building site and the portions of the building (walls, stairs, roof, etc.) that were used in common.

Rudolf Huebner, *History of the Germanic Private Law* 174 (1918) (translations omitted; emphases added). This ancient tradition matches Arizona's condominium structure, in which individual units are separately owned, with shared ownership of the common elements. *See* A.R.S. § 33-1204(A).

British and early American law likewise recognized this type of ownership.

See, e.g., 1 E. Coke, *Institutes*, *48b (1628) ("A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal it shall pass by livery."); *Madison v. Madison*, 69 N.E. 625, 627 (Ill. 1903) ("A house, or even the upper chamber of a house, may be held separately from the soil on which it stands ….").

The right to separate ownership of individual units, with both horizontal and vertical divisions, long predated Arizona's adoption of article 2, § 17, let alone A.R.S. § 33-1228. It therefore falls within the "traditional property interests" protected by the takings clause. *Tyler*, 598 U.S. at 638. The legislature cannot give authority to anyone to take someone else's condominium unit.

Dorsey Investments offers four main responses to the constitutional argument. First, it argues that this case arose under contract, not statute. But no contract authorized this forced sale. Dorsey Investments points to the condominium's Declaration, but the Declaration does not authorize forced sales. (*See* § III.C, below; *see also* Xias' Petition at 12-22.) It also points to the termination agreement. [IR-51, Ex. 2.] But the Xias never agreed to the termination agreement so that cannot provide the necessary contractual consent.

Second, Dorsey Investments argues that it is not a government entity and this case does not involve eminent domain. The Xias explained that the takings clause is not so limited. (Cross-PFR Resp. at 9-10.)

Third, it presents other examples such as partition actions or receivership. The Xias explained that these examples either arise from the "longstanding background restrictions on property rights" that do not offend the takings clause, *Cedar Point*, 141 S.Ct. at 2079, or do not involve forced sales.

Fourth, it points to policy arguments such as holdout problems or safety risks. But the Xias explained that the framers of Arizona's Constitution resolved the holdout issue in favor of property rights, and other laws (e.g., blight and safety inspections) resolve the other concerns. (Cross-PFR Resp. at 15-16.)

In sum, A.R.S. § 33-1228(C) authorizes one person to sell someone else's property. It therefore authorizes the taking of private property for private use, which violates article 2, § 17.

II. A sale under § 33-1228 requires selling everything.

The background rule for private property is that you can't sell what you don't own. *See, e.g.*, 2 Blackstone, *Commentaries*, *2 ("sole and despotic dominion"); *Buehman*, 57 Ariz. at 375 ("One of the principal elements of property is the right of alienation or disposition.").

In those rare instances where the law departs from this background rule by allowing someone to sell someone else's property, then the sale must strictly comply with the law's requirements. A party cannot sell someone else's property in a manner not authorized by the law; otherwise it is theft or conversion. Consequently, if a

forced sale under A.R.S. § 33-1228 is permissible, then that sale must strictly comply with § 33-1228's requirements.

Here, the only provision authorizing any sale requires selling everything: "A termination agreement may provide that *all the common elements and units* of the condominium shall be sold following termination." A.R.S. § 33-1228(C) (emphasis added). This provision does not authorize selling anything less than "all the common elements and units." "In short, 'all' means all." *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998). This is the only section authorizing selling anything.

A party looking to sell only *some* units must rely on some other source of authority (e.g., express consent). In this context, the law does not need to expressly *prohibit* selling less than everything. The background rule—no selling other people's stuff—takes care of that. Selling someone else's property requires express authorization (by law, contract, or otherwise), not just the absence of a prohibition.

The permissive "may" in § 33-1228(C) does not change the analysis because that merely confirms that the parties may terminate without selling property. Similarly, the phrase "any real estate" in that section does not authorize any sales, but merely recognizes that not every termination will involve selling any property.

The legislature's decision to require selling all property makes sense because it aligns everyone's incentives. Under § 33-1228's text, the money from the sale after expenses is pooled ("Proceeds of the sale") and distributed *proportionally* ("in

proportion to the respective interests of unit owners"), using appraisals ("fair market values") to set the percentage interest ("respective interests") of each unit owner. In other words, each unit owner doesn't get a fixed sum (the appraisal value), but instead gets a percentage of the total net proceeds. (*See* COA Op. Br. at 24-45.)

If everyone's property is at stake, then everyone has the same incentive to seek the highest total price, which will maximize how much each owner gets paid. Here, by contrast, Dorsey Investments was the only unit owner voting for a sale, yet it had no property at stake and in fact was voting to *sell to itself*. This means Dorsey Investments had a strong incentive to *minimize* the sale price. Selling everything, as the statute requires, would give everyone the same incentive to maximize the price and therefore reduces the incentives for the kind of self-dealing that occurred here.

A subsequent change by the Uniform Law Commission confirms that § 33-1228 requires selling *all* units. "When, as here, a statute is based on a uniform act, we assume that the legislature intended to adopt the construction placed on the act by its drafters and commentary to such a uniform act is highly persuasive." *May v. Ellis*, 208 Ariz. 229, 232 (2004) (cleaned up). Until 2021, the Uniform Common Interest Ownership Act required sales to include "all of the common elements and units," as Arizona's law requires. A 2021 "revision allows for the sale of some but not all common elements and units." Uniform Common Interest Ownership Act (2021) at 106, cmt. 6. The Uniform Act now states that a termination "may provide

for the sale of some or all of the common elements and units." *Id.* at 100, § 2-118(c). This amendment confirms that the prior version of the Uniform Act requires selling everything. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) ("If the legislature amends or reenacts a provision … a significant change in language is presumed to entail a change in meaning."). Arizona has not adopted the amendment, meaning the original requirement of selling everything still applies (and unquestionably applied in 2019 when this forced sale occurred).

III. The Declaration references the Condominium Act as a statutory scheme, so the reference includes the constitutional limits on statutes.

Parties may intend a contract to refer to a statute *as a statute*, or they may instead intend text from a statute to be treated as a contractual term. Which they have done depends on their intent as expressed by the chosen text and context. Here, the Declaration expressly distinguishes between rights the Association has under existing law and rights created in the condominium documents. The right at issue here—to take the Xias' property against their will—comes *only* from existing law (a statute in the Condominium Act). That means that if the statute is unconstitutional, then the Association had no right at all to take the Xias' property.

A. A contract's intent determines whether a referenced statute functions as a statute.

1. Every contract is governed by a body of law, including relevant statutes, whether it expressly says so or not. *See Sch. Dist. No. One of Pima Cnty. v. Hastings*,

106 Ariz. 175, 177 (1970) ("[T]he Constitution and laws of the State are a part of every contract."). A contract may also expressly identify a governing body of law that would not otherwise apply, as when an Arizona contract selects Delaware law. There, the obligation to abide by Delaware law *arises from contract* but the nature and status of Delaware law remains independent of the contract. In other words, the contract inherits the meaning and context of the relevant Delaware statutes *qua* statutes even though the obligation to comply with those statues arises from contract.

This remains true if a contract similarly references a specific act or code. For example, a Nevada contract could say that "the parties' rights and obligations shall be determined as set forth in the Arizona Uniform Commercial Code and other applicable law." Again, the obligation to comply with the Arizona U.C.C. would arise from contract. But because the contract references the statutory scheme *in its capacity as a statutory scheme*, the nature of the obligations that arise from contract would be determined as a matter of statutory law.

2. Alternatively, a contract could intend to treat text from a statute as a purely contractual term without regard to the independent legal status and nature of the referenced statute. In other words, a contract could incorporate a statute and intend that the text from the referenced statute no longer function as statutory. For example, a contract might say that "A.R.S. § 47-2308(1) from the 2023 version of the Arizona Uniform Commercial Code is hereby incorporated by reference as

though the text of that statute were set forth in full as a term of this contract and shall be interpreted as a contract term rather than as a statute."[1] In such a case, the parties would be expressing their intent that the text from this statute function as independent, direct contractual text without regard to its status as a statute.

B. Unless a contract intends a referenced statute to not be a statute, the contract remains subject to judicial interpretation and the constitutional limitations applicable to the statute.

Parties have the freedom to refer to a statute in a contract with the intent that the referenced statute retain its status as statutory—and function as such—or not. They may intentionally choose one over the other because they are conceptually distinct, function differently, and have different legal consequences.

1. When a contract references a statute in its capacity *as a statute* (i.e., statute *qua* statute), the parties intend the statute to function as a statute. To return to basics, a statute is a law enacted by the legislature. The judicial branch interprets the meaning of statutes, including determining any constitutional limitations. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). "To conclude otherwise would deprive the judiciary of its authority, and indeed its obligation, to interpret and apply constitutional law." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229

[1] A.R.S. § 47-2308(1) provides that unless otherwise agreed, "[t]he place for delivery of goods is the seller's place of business or if he has none his residence."

Ariz. 347, 354–55, ¶ 33 (2012). So when a contract references a statute in its capacity as a statute, the implied term "as interpreted by the courts" accompanies that concept. In such cases, what courts have said about the statute (e.g., the U.C.C.'s duty of good faith found in A.R.S. § 47-1304 in the prior example) may matter.

2. When a contract intends text that originated in a statute to function purely as a direct, independent contractual term without regard to its statutory nature, then the legal status of the source material may no longer matter (other than perhaps tangentially). In other words, if the contract did not intend judicial interpretation of a statute to matter, then it may not affect the obligations of the parties.

For contracts in the first category, if the source of a power comes from a referenced statute, then that statute determines the limits of the power. That is a key lesson from the 11/18/2022 Goldwater brief (at 3-8) and its discussion of *Seaborn v. Wingfield*, 48 P.2d 881 (Nev. 1935). Moreover, any other conclusion would make no sense for a variety of reasons, as discussed in the Xias' Petition at 15-18.

Again returning to basics, a power that comes from a statute referenced in a contract necessarily derives from the statute, and therefore the power cannot be broader than the principal source of that power. If the principal source (the statute) has constitutional limitations, then those same limits necessarily apply to the derivative reference in the contract. After all, it cannot be that a statute has constitutional limitations, but a power derived from that statute, and placed in a

contract, is *free* of those constitutional limitations. *See Seaborn*, 48 P.2d at 886 ("incorporat[ing] under an act which contained an unconstitutional provision cannot render the provision enforceable, nor confer any power on the court to enforce it.").

Indeed, the Constitution limits every statute the legislature enacts, so those limits necessarily accompany every reference to the statute:

> There is no position which depends on clearer principles, than that every act of a *delegated authority*, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the *deputy is greater than his principal*; that the *servant is above his master* ….

The Federalist No. 78 (emphases added). This rule does not go away when one references a statute in a contract. To the contrary, "the Constitution … [is] a part of every contract." *Hastings*, 106 Ariz. at 177. When a contract references a statute in its capacity as a statute, the implied term "as limited by the Constitution" accompanies the statute because the Constitution is *already a part of the contract*.

In sum, whether a statute referenced in a contract should be interpreted as a statute or not depends on the contract's intent. Because judicial interpretation and constitutional limitations are implicit in every statute, then absent some expressed intent to strip a referenced statute of its statutory function, a referenced statute remains subject to judicial interpretation and any constitutional limitations.

C. The Declaration's text reflects an intent to refer to the Act as a statutory scheme, not to incorporate the text from that Act as additional contractual terms.

"A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Powell v. Washburn*, 211 Ariz. 553, 557 (2006). Any ambiguity is resolved "against the restriction and in favor of the free use and enjoyment of the property." *Wilson v. Playa de Serrano*, 211 Ariz. 511, 514, ¶ 10 (App. 2005) (quotation marks and citation omitted).

Although in some cases it may be difficult to discern whether a declaration intends to refer to a statutory scheme as a statutory scheme or as direct, independent contractual text untethered from its statutory capacity, it's easy in this case. The key sentence from Declaration § 6.1 expressly distinguishes between the two primary sources (legal vs. contractual) for the rights, powers, and duties of the Association:

> The Association shall have such rights, powers and duties [1] as are prescribed by the Condominium Act, other applicable laws and regulations and [2] [such rights, powers and duties] as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act."

[IR-51, Ex. 1 at 24 (bracketed numbers and text added).]

The first phrase—"duties as are prescribed by the Condominium Act, other applicable laws and regulations"—can only be read as referencing existing

applicable law as the source for those "rights, powers and duties," not as creating any new or independent rights as a matter of contract. Nothing in this text suggests that it purports to create *new* rights, powers and duties not found in the referenced legal sources, let alone to erase existing constitutional rights. The phrase merely informs the reader that existing law gives the Association certain rights.

The second phrase—"and [such rights, powers and duties] as are set forth in the Condominium Documents"—confirms this construction because it expressly delineates between the rights, powers and duties afforded by existing law and those created in the contract documents, including the Declaration. ("'Condominium Documents' means this Declaration and the Articles, Bylaws and the Rules." [IR-51, Ex. 1 at 2.]) This plain text means that only the separate terms found in the Documents (not the referenced statutory scheme with its dozens of sections regulating nearly every aspect of condominiums) qualify as contractual terms that impose obligations separate and apart from those created by the referenced legal sources (which remain subject to judicial interpretation).

Simply put, no one would expect that a contractual provision giving the Association the "powers … prescribed by the Condominium Act" would in fact give the Association *broader* powers than the Association would have when acting under the Condominium Act directly. In fact, no one would view this boilerplate text as altering the legal landscape at all. All it does is repeat what was already true by

operation of law; the Condominium Act "applies to all condominiums created within this state." A.R.S. § 33-1201. The fact that Declaration § 6.1 also references "other applicable laws and regulations," which could include *any* statute, confirms that no one intended this provision to alter the legal landscape or strip constitutional rights.

Moreover, the Constitution surely falls within the "applicable laws" as expressly invoked by Declaration § 6.1, so the powers "prescribed by the Condominium Act" must also include Constitution's limitations on statutes.

Other considerations confirm this conclusion. Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *State v. Rickman*, 148 Ariz. 499, 503 (1986). Arizona voters have confirmed that "all property rights are fundamental rights." Prop. 207 (2006). "[F]undamental restrictions" of property rights in a declaration must also be "clear and unambiguous," and must be designed to put purchasers "on notice." *Wilson*, 211 Ariz. at 514-15, ¶¶ 10, 16. Other courts recognize that waiving the constitutional protection against takings requires "clear, unambiguous, unmistakable, and conspicuous language." *Missouri v. Muslet*, 213 S.W.3d 96, 99 (Mo. Ct. App. 2006).

No reasonable person would view Declaration § 6.1 as consenting to allow anyone to forcibly take their property, waiving article 2, § 17 of the Constitution, or giving up their fundamental right to keep their home. A broad reference to *already-applicable* background law does not put reasonable people on notice that they are

waiving fundamental constitutional and property rights.

To top it off, condominium declarations and other CC&Rs require special care because they are "special types of contracts." *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 538, ¶ 14 (2022). In an ordinary contract—even an adhesion contract—a party has at least a *theoretical possibility* of negotiating over terms. But with CC&Rs, there is no counterparty at all. They are servitudes that run with the land and bind all future purchasers by virtue of *property* law, not contract law. Accordingly, courts "do not enforce 'unknown terms which are beyond the range of reasonable expectation.'" *Id.* (citation omitted). This is precisely why "a fundamental restriction of the individual owners' expected property rights must be set forth in the Declaration with sufficient specificity that purchasers are on notice that the occupancy of their property could be severely restricted." *Wilson*, 211 Ariz. at 515, ¶ 16. Declaration § 6.1's broad, generic statutory reference flunks this test.

Arizona voters have confirmed that property is a fundamental right in Arizona. People should not lose their homes because a servitude attached to their home referenced an unconstitutional statute. Accordingly, if the Court holds that A.R.S. § 33-1228 violates article 2, § 17, then the Declaration's statutory reference takes the statute subject to that judicial holding. The Declaration therefore gives the Association only the *lawful* powers of the Condominium Act, which do not include taking the Xias' property.

D. Dorsey Investments' efforts to avoid the import of the Declaration's plain text miss the point.

Incorporation. Dorsey Investments claims in its PFR Response (at 15) that "the Condominium Act was specifically incorporated into the Declaration." But under Arizona law, "[w]hile it is not necessary that a contract state specifically that another writing is 'incorporated by this reference herein,' *the context in which the reference is made must make clear that the writing is part of the contract*." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 260, 268 (App. 2007) (emphasis added). "[M]ere reference to a document for descriptive purposes does not operate as an incorporation of the document …." *Id.*

Here, the pertinent text purports to describe the Association's powers under existing law ("powers … prescribed by the Condominium Act"), but does not incorporate anything. *Cf. Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 826 (Fed. Cir. 2010) (a contract's "passing reference to the entire corpus of [an act]" does not "automatically result in 'wholesale incorporation' of that statute."); *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988) ("This is hardly the type of clause that should be read as incorporating fully into the contract all the [agency] regulations.").

More fundamentally, nothing in the Declaration or the context here suggests any intent to deprive the Act of its default statutory nature subject to the usual rules of judicial interpretation and constitutional limitation, let alone waive any

constitutional rights. (*See also* 11/18/2022 Goldwater brief at 6-7). To the contrary, if a contract says a party has "the rights prescribed by an Act and other applicable laws," it means *the law* is prescribing those rights, not the contract itself.

Existing law. Dorsey Investments notes that "contractual language must be interpreted in light of existing law" at the time of the contract. (PFR Response at 17 (citation omitted).) But "[i]n Arizona, an opinion in a civil case typically applies retroactively as well as prospectively." *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 228, ¶ 40 (2022); *see also* 11/18/2022 Goldwater brief at 7 n.1.

Fundamental right. Dorsey Investments claims (Petition Response at 16) this case involves no fundamental right. Prop. 207 says otherwise, and this misses the point. Dorsey Investments purportedly had the right to sell the Xias' condominium against their will only because of A.R.S. § 33-1228. If that statute is unconstitutional, Dorsey Investments had no authority to do what it did.

Separate authority from the Declaration. In their Response to Amici (at 9) Defendants suggest this is an example of private parties agreeing to do things the Constitution does not authorize. But again, the only authority for taking the Xias' property comes from A.R.S. § 33-1228, and that statute was not incorporated as a direct, independent contract term. Perhaps the Declaration *could* have said "90% of unit owners may vote to sell any person's unit," but it did not. It merely gave the Association the "powers … prescribed by the Condominium Act."

IV. A statutory reference does not always include subsequent amendments.

If the parties intended a statutory reference in a declaration to function as a statute, then subsequent statutory amendments apply by operation of law, subject to ordinary constitutional limits. If, however, the parties intended to treat a statute as a direct, independent contractual term, with no statutory context or limits, then subsequent amendments do not apply if they fall outside "a homeowner's reasonable expectations." *Kalway*, 252 Ariz. at 538, ¶ 15.

Consider a hypothetical Condominium Act amendment: "upon demand from the state or any political subdivision, the association must transfer title to any units and common elements to the state or political subdivision, for no compensation." Applying this unconstitutional amendment would "allow[] substantial, unforeseen, and unlimited amendments [to] alter the nature of the covenants to which the homeowners originally agreed." *Id.* An existing declaration's reference to powers "prescribed by the Condominium Act" would not include this amendment.

This issue raises complicated questions, which confirms why courts should be wary of applying unconstitutional statutes in the first place. If the Court rules that Declaration § 6.1 references the Condominium Act as a source of law, not as an independent contractual term, then the Court need not reach Issue 4.

CONCLUSION

The Court should reverse, remand, and award the Xias' their fees.

RESPECTFULLY SUBMITTED this 12th day of September, 2023.

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STATUTORY ADDENDUM*

A.R.S. § 33-1228 (2018)

§ 33-1228. Termination of condominium

Effective: August 3, 2018 to August 26, 2019

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B of this section. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as

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* For the Court's convenience, this addendum includes the versions of A.R.S. § 33-1228 effective in 2018 (in effect when the forced sale occurred) and 1986 (in effect when the Xias purchased Unit 106).

provided in subsection G of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit. During the period of that occupancy, each unit owner and the successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units that were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F of this section are as follows:

1. Except as provided in paragraph 2 of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the

final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, on foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C, D, E, F, H and I of this section do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contains provisions inconsistent with these subsections.

K. Beginning on the effective date of this amendment to this section, any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy.

A.R.S. § 33-1228 (1986)

§ 33-1228. Termination of condominium

Effective: January 1, 1986 to August 3, 2018

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty per cent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection G. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in

interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units which were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F are as follows:

1. Except as provided in paragraph 2, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty per cent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a

portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may, on foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C through I do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contain provisions inconsistent with such subsections.